IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-134

NESGLO, INC., NESTOR CRUZ in his own behalf and on behalf of the Conjugal Partnership constituted with GLORIA DIAZ DE CRUZ, and GLORIA DIAZ DE CRUZ,

Petitioners,

v.

THE CHASE MANHATTAN BANK, N.A., STANLEY ZYCH and ENRIQUE FERNANDEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JAY A. GARCIA-GREGORY
FIDDLER, GONZALEZ & RODRIGUEZ
G.P.O. Box 3507
San Juan, Puerto Rico 00936
(809) 753-3113

Counsel for Respondents

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QUESTION PRESENTED

Does the decision of the Court of Appeals adopting the District Court's reasoning in refusing to entertain jurisdiction over petitioners' claims and dismissing the appeal on grounds of mootness conflict in any way with applicable decisions of this Court or the decision of a Court of Appeals for another Circuit?

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Respondent, The Chase Manhattan Bank, N.A., ("Chase") opposes the petition of Nesglo, Inc., *et al.*, for a writ of certiorari. Petitioners have demonstrated no special or important reason for review. Their mere dissatisfaction with the decision below is insufficient.

OPINION BELOW

The two orders of the Court of Appeals for the First Circuit on Appeal Nos. 81-1097 and 83-1166 are reprinted in the Appendix to the Petition for Certiorari at pages 68a-69a.

JURISDICTION

The orders of the court below on Appeal Nos. 81-1097 and 83-1166 were entered on March 4, 1983 and April 28, 1983, respectively. The petition for a writ of certiorari was filed on July 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved in this petition is 28 U.S.C. § 1738, which is set forth, *inter alia,* at pages 4 and 5 of the Petition for Certiorari.

STATEMENT OF THE CASE

The Commonwealth Complaint and Proceedings

On November 9, 1978, Chase commenced an action against petitioners in the Superior Court of Puerto Rico alleging that defendant-petitioner Nesglo, Inc. ("Nesglo") had defaulted on a loan and factor's lien contract and that, as a result, defendants-petitioners Nestor Cruz ("Nestor") and Gloria Diaz de Cruz ("Gloria")—the sole shareholders of Nesglo—were liable to Chase on their guarantee. On or about March 26, 1979, petitioners filed a joint answer generally denying the allegations of the complaint and raising several affirmative defenses including violations of the Tying Arrangement Act, 12 U.S.C. § 1971 *et seq.* (the "Tying Act"). In addition, petitioners Nestor and Gloria filed a counterclaim sworn to by Nestor, as president of Nesglo, essentially repeating the substance of the affirmative defenses and seeking damages due to Chase's purported violations of the Tying Act, usurious interest charges and violations of civil rights.

On April 25, 1979, Chase moved to dismiss Nestor's and Gloria's counterclaim. They opposed asserting, *inter alia,* that they had standing to sue on their own as well as Nesglo's behalf

for violations of the Tying Act because of their status as sole stockholders as well as joint and several guarantors of Nesglo. The Superior Court denied Chase's motion and the Supreme Court of Puerto Rico dismissed Chase's interlocutory appeal.

Both sides then engaged in substantial discovery proceedings.

The Complaint in Federal Court

Meanwhile, on or about July 23, 1979, petitioners commenced an action in the United States District Court for the District of Puerto Rico. The complaint alleged, *inter alia*, substantially identical violations by Chase of the Tying Act, and sought, *inter alia*, treble the damages attributable to these purported violations.

Chase moved to dismiss the complaint and, in the alternative, for a stay of the federal action, inasmuch as petitioners had already chosen a Commonwealth forum in which to prosecute these claims.

Chase's motion was granted and the action dismissed on December 2, 1980. Petitioners promptly appealed the dismissal to the United States Court of Appeals for the First Circuit. The appeal was briefed by both parties and oral argument scheduled for September 11, 1981.

Interim Proceedings in the Commonwealth Court Action

On June 23, 1980, Chase served a set of interrogatories on each of the petitioners in the Puerto Rican action. Petitioners failed to answer the same and, on August 6, 1980, Chase informed the Superior Court of this failure and sought the entry of judgment and the dismissal of their affirmative defenses and counterclaims. Nesglo alone appeared in opposition to Chase's motion and requested a twenty-day extension in which to file answers to the interrogatories. The extension was granted. Nestor and Gloria never appeared.

August 6 came and went without answers having been served and, on September 15, 1980, Chase so notified the Court. Petitioners responded that their answers were then in

the process of being prepared but that they required another twenty days to complete this process. The Superior Court agreed to an additional twenty-day extension.

On January 30, 1981—some four months later—the answers had still not been served and Chase again moved for entry of judgment in its favor and the dismissal of petitioners' affirmative defenses and counterclaims. Petitioners responded on February 9, 1981, stating that they had completed their answers to the interrogatories but needed an additional 10 days in order to obtain the requisite signatures and oaths. The Superior Court once again granted petitioners' request for an extension. The answers were *not* served or filed.

On May 15, 1981, the Superior Court found petitioners' non-compliance with its prior orders to be willful and inexcusable and, as a result, entered judgment against petitioners and dismissed all petitioners' affirmative defenses and counterclaims with prejudice. (Pet. App.* 1a-11a.)

Petitioners moved for reconsideration and said motion was denied by the Superior Court on June 3, 1981. Petitioners then sought review before the Supreme Court of Puerto Rico. Said Court declined to review the case, which ultimately became final and unappealable.

Subsequent Proceedings in the Federal Action

The May 15, 1981 decision of the Superior Court became final prior to the scheduled oral argument of petitioners' appeal to the First Circuit on September 11, 1981. In light of this fact, the First Circuit—while retaining jurisdiction of the appeal—remanded to the District Court for the purpose of: (a) deciding whether the final judgment entered by the Superior Court rendered the petitioners' appeal moot; and (b) reporting its findings and conclusions to the First Circuit. (Pet. App. 14a-15a.)

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* References to "Pet." are to the Petition for Certiorari, and references to "Pet. App." are to the Appendix thereto, which appears at pages 1a-70a of the Petition.

In compliance with the mandate of the First Circuit, the District Court instructed Chase and the petitioners to file with it relevant portions of the record before the Superior Court, suitably translated, and to brief and argue the issues of mootness, *res judicata* and collateral estoppel. After substantial delays due to disagreements between Chase and the petitioners regarding what portions of the Superior Court record were relevant, those portions and the parties' briefs were filed with, and oral argument heard by, the District Court—following which the parties were granted the opportunity to file additional memoranda and did so.

After careful consideration of the record and of the parties' briefs, the District Court reported its findings to the First Circuit on February 8, 1983, in lengthy and detailed Findings of Fact, Conclusions of Law and a Memorandum Opinion ("Findings"). (Pet. App. 17a-54a); *see* 562 F. Supp. 1029 (D.P.R. 1983). The District Court found that petitioners' Commonwealth and federal claims were substantially the same and involved the same parties, that petitioners had a full and fair opportunity to litigate their claims against Chase in the Commonwealth Courts and that, solely as a result of petitioners' "willful and intentional failure to comply with a discovery order under rules of civil procedure identical to those governing civil actions for the federal district court" (Pet. App. 19a), the Superior Court properly dismissed all petitioners' claims. The District Court further found that the Superior Court's dismissal of petitioners' claims was *res judicata* under the laws of Puerto Rico and was entitled to full faith and credit pursuant to the provisions of 28 U. S. C. § 1738. Petitioners' federal action was moot.

Instead of moving for additional or supplementary findings or for reconsideration of the Findings by the District Court, petitioners filed a new notice of appeal from the same, but the First Circuit rejected this appeal since it was not filed pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure and was not from a separate, final decision of the District Court but from Findings which were an integral part of the initial appeal. (Pet. App. 68a.)

On March 4, 1983, the First Circuit issued its Memorandum and Order adopting the District Court's "thorough and persuasive opinion." (Pet. App. 59a-60a.) The First Circuit expressly agreed with the District Court's conclusion that the mandatory extension of full faith and credit to the Commonwealth court judgment of May 15, 1981 rendered petitioner's federal case moot. (Pet. App. 59a.) The First Circuit remanded the case to the District Court for entry of a judgment of dismissal on the grounds of mootness. (Pet. App. 60a.) Petitioners moved for reconsideration but the First Circuit denied the motion finding "that it does not bring to our attention points of law which we overlooked or misapprehended and that the issues it raises are adequately answered in the district court's opinion." (Pet. App. 69a.)

On June 20, 1983, the District Court entered judgment dismissing petitioners' claims on the grounds of mootness. (Pet. App. 70a.)

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THE DECISION BELOW, WHICH IS ENTIRELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT ON THE EXTENSION OF FULL FAITH AND CREDIT TO STATE COURT JUDGMENTS

While the petition occasionally attempts to suggest that the decision of the Court of Appeals is "openly contrary" (Pet. 12) to decisions of this Court, its gravamen is that the decision is "totally erroneous" (Pet. 15). It is, of course, fundamental that mere error is not a ground for certiorari. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals ... was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."). *See also Buchanan v. Evans*, 439 U.S. 1360, 1365 (1978); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

Petitioners contend that the decision below is in conflict with decisions of this Court in that said decision "grants concurrent jurisdiction to federal and state courts to entertain and decide exclusive jurisdiction treble damage actions based on the Bank Holding Company Act, 12 U.S.C. § 1975." (Pet. 12.) Petitioners neglect to indicate where in the decisions below such a holding could be found, and with good reason. The District Court's Findings, adopted in their entirety by the Court of Appeals, expressly *refused* to make such a holding, stating that it was "unnecessary to reach this issue [concurrent jurisdiction] on the present record." (Pet. App. 49 n.25.) The only holding below which could even conceivably be reviewed by this Court was the following: "because 28 U.S.C. § 1738 commands a federal court to give the same full faith and credit to a state court judgment that it would be accorded in the state's own courts and because the Commonwealth [Superior] Court judgment of May 15, 1981 [striking petitioners' claims for willful failure to comply with legitimate discovery requests] would be given full preclusive effect by the Courts of Puerto Rico, this case has been rendered moot." (Pet. App. 59a.)

Far from being in conflict with the decisions of this Court, the decision below is in full accord with this Court's recent teaching regarding the circumstances under which a state court judgment will be afforded full faith and credit by the federal courts and thus, operates as *res judicata* to moot a federal action. Those cases indicate that United States Courts must afford "the same full-faith-and-credit to state court judgments that would apply in the State's own Courts." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 462-63, *reh'g denied*, ____ U.S. ____, 103 S. Ct. 20 (1982). *See also Allen v. McCurry*, 449 U.S. 90 (1980).

The Circuit Court was confronted with a final decision by the Superior Court of the Commonwealth of Puerto Rico entering judgment against petitioners and dismissing all petitioners' claims—including the very claims asserted in petitioners' federal action—with prejudice as a consequence of petitioners' willful failure to comply with legitimate discovery requests

(Pet. App. 1a-11a)—a decision which petitioners did not appeal to this Court under 28 U.S.C. § 1258, as was their clear right after the Supreme Court of Puerto Rico had denied review. The Circuit Court was also confronted with the District Court's finding that the Commonwealth courts are of the view that an involuntary dismissal for failure to comply with discovery rules operates as an adjudication on the merits and should be accorded full *res judicata* effect. *Nesglo, Inc. v. Chase Manhattan Bank, N.A.*, 562 F. Supp. 1029, 1037 (D.P.R. 1983); *Rodriguez v. Baldrich*, 508 F. Supp. 614, 616 (D.P.R. 1981); *Souchet v. Cossio*, 83 P.R.R. 730 (1961); *Perez v. Bauza*, 83 P.R.R. 213, 217-18 (1961).

Under such circumstances, this Court has made it clear that such a "penalty dismissal" must be accorded full *res judicata* effect. A claimant does not have an "unencumbered opportunity to litigate a [federal] right in federal district court." *Allen v. McCurry, supra*, 449 U.S. at 103. It is only necessary that a claimant have "a full and fair opportunity" to present his claims in state court. *Id.* at 95. And "what a full and fair opportunity to litigate entails is the procedural requirement of due process." *Kremer v. Chemical Construction Corp., supra*, 456 U.S. at 481-82. The mere fact that a particular litigant "fail[s] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Id.* at 485.

Although petitioners generally contend that full faith and credit should not have been extended to the Superior Court judgment, their authorities are inapposite. Of all the authorities cited in the petition, only *Kremer* and *Allen* (Pet. 16) concern the extension of full faith and credit to state court judgments and, as we have seen, the decision below is fully consistent with their teaching.

Petitioners do claim that Nesglo itself and the "conjugal partnership" of Nestor and Gloria did not enjoy the opportunity to press their federal claims at the state level because Nesglo did not file a counterclaim and the conjugal partnership was not a party to the state action. (Pet. 7-8.) However, petitioners raised these exact same points with the District Court and with the Circuit Court on motion for reconsideration

(Pet. App. 62a, 66a-67a) and the factual issues raised thereby were considered and rejected by both the District and Circuit Courts (Pet. App. 35a-43a, 69a). Such consideration and rejection are normally accorded the greatest deference by this Court. *See, e.g., Pullman-Standard v. Swint,* 456 U.S. 273, 285-90 (1982) (findings of fact by District Court should not be upset by appellate court unless clearly erroneous); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949) (concurrent findings of fact by two courts below should not be disturbed except upon a very obvious and exceptional showing of error); *Workman v. City of New York,* 179 U.S. 552, 555 (1900) (to the same effect); *see also, Fornaris v. Ridge Tool Co.,* 400 U.S. 41, 43 (1970); *Cf. Sancho v. Texas Co. (P.R.), Inc.,* 308 U.S. 463, 470-72 (1940); *Sancho v. Yabucoa Sugar Co.,* 306 U.S. 505, 510-11, *reh'g denied,* 307 U.S. 650 (1939); *see generally, Diaz-Buxo v. Trias Monge,* 593 F.2d 153, 156-57 (1st Cir.), *cert. denied,* 444 U.S. 833 (1979) and authorities cited therein. Petitioners do not demonstrate that the findings of the courts below are in any way in conflict with the decisions of this or any other Court and absent such a showing, petitioners are simply not entitled to "another hearing." *Magnum Import Co. v. Coty, supra,* 262 U.S. at 163.

Petitioners also contend that the Commonwealth Court's judgment is not entitled to preclusive effect because that court erroneously assumed jurisdiction over petitioners' Tying Act claims. (Pet. 13.) However, petitioners neglect to mention that they were not involuntary defendants who were hauled into state court over their objections but aggressive counterclaimants who not only voluntarily introduced the purported violations of the Tying Act into the state action but also affirmatively persuaded the Superior Court to accept jurisdiction over those violations in arguing against Chase's motion to dismiss. As the Fourth Circuit held in *Nash County Board of Education v. Biltmore Co.,* 640 F.2d 484 (4th Cir.), *cert. denied,* 454 U.S. 878, *reh'g denied,* 454 U.S. 1117 (1981), petitioners:

> by choosing to file the state action on the same cause of action had voluntarily waived the benefits, if any, of a federal forum and both res

> judicata and collateral estoppel should be available to bar a cause of action, even though the federal action was within the exclusive jurisdiction of a federal court.

Id. at 497. *See also Williamson v. Columbia Gas & Electric Co.*, 186 F.2d 464, 467 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

Moreover, if petitioners objected to the decision of the Superior Court on jurisdictional or other grounds, petitioners' remedy was to pursue orderly avenues of appeal, not to file a new, federal action. Having failed to do so, petitioners cannot now challenge the merits of that judgment. As this Court held in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), whether the state decision is correct or not is immaterial for *res judicata* purposes.

> Nor are the res judicata consequences of a final unappealable judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Id. at 398 (citations omitted). *See also Erspan v. Badgett*, 659 F.2d 26, 28-29 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Key v. Wise*, 629 F.2d 1049, 1055-57 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103 (1981).

Finally, petitioners suggest that the dismissal of their affirmative defenses and counterclaims by the Superior Court is an "unheard of sanctioning order" (Pet. 9) which should not be recognized by this Court. However, this Court has only recently upheld the right of lower courts to enter just such "sanctioning orders" whenever they are confronted with willful and inexcusable failure to comply with discovery orders. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *reh'g denied*, 429 U.S. 874 (1976). As this Court therein held:

> The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to

> penalize those whose conduct may be deemed to warrant such a sanction but to deter those who might be tempted to such conduct in the absence of such a deterrent .... The extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities.

Id. at 643. *See also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980); *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 15-17 (1st Cir. 1983); *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981), *cert denied*, 459 U.S. ____, 103 S. Ct. 60 (1982); *Nasser v. Isthmian Lines*, 331 F.2d 124 (2d Cir. 1964) (involuntary dismissal for failure to answer interrogatories operates as *res judicata* in subsequent suit).

In sum, the decision below faithfully followed the recent decisions of this Court regarding the extension of full faith and credit to state court judgments. The District Court—and the First Circuit—each found that petitioners had a full and fair opportunity to present their federal claims in the Commonwealth Court, that the Superior Court dismissed those claims with prejudice solely due to petitioners' willful failure to comply with discovery requests and that this dismissal would be given "full preclusive effect" by the Courts of Puerto Rico. Accordingly, under the mandate of *Kremer* and *Allen*, the court below had no choice but to accord full faith and credit to the Superior Court decision and dismiss petitioners' federal action as moot. In the words of this Court, to do otherwise "not only would violate basic tenets of comity and federalism, but also would reduce the incentive for States to work toward effective and meaningful [judicial] systems." *Kremer v. Chemical Construction Corp., supra*, 456 U.S. at 478 (citation omitted).

CONCLUSION

There is simply no reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted,

JAY A. GARCIA-GREGORY
FIDDLER, GONZALEZ & RODRIGUEZ
G.P.O. Box 3507
San Juan, Puerto Rico 00936
(809) 753-3113

Counsel for Respondents.

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